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90-770

No.

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

v.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate Rule 52(a), Fed.R.Civ.P. by setting aside findings of fact by the District Court that were not clearly erroneous, regarding

(a) whether the union and employer intended their agreement tc be final or contingent upon some subsequent agreement; and

(b) the employer's actual knowledge of the union officers' lack of authority to execute a side agreement?

2. When a labor organization's officers, without membership approval and without authorization by the union's governing body, enter with an employer into a side agreement that takes away

rights and benefits guaranteed to employees by the extant collective bargaining agreement, does the labor organization violate its duty of fair representation?

3. Does an employer participate in a labor organization's breach of duty of fair representation when, aware that the labor organization's officers have no authority to enter into a side agreement without ratification by the union's membership, it nevertheless participates with those officers in executing and putting into effect, without ratification, such a side agreement which reduces wages and otherwise damages the employees represented?

Parties to the Proceedings Below

The plaintiffs in the District Court were the petitioners here, Ted Kozera, Mike Hanley, Chris Kulers, Michael Cinelli, Frank Honan and James Stemmerman, suing individually and on behalf of the class of members of Local 501.

Defendants were (a) the Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc., ("Chapter") and (b) Local 501 of the International Brotherhood of Electrical Workers ("Local 501").

Chapter is a corporation organized in the State of New York. Local 501 is a labor organization; it was sued both in its own name and by its president and treasurer, Donald Werle and Douglas Reid, respectively, who were sued in their representative capacities.

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II. The Courts below, by holding that a breach of duty of fair representation committed by a labor union's officers is not attributable to the union if "unauthorized," and that the employer is not liable for its participation in that breach, have decided a federal question in a way in conflict with applicable decisions of this Court. 24

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TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ted Kozera, Mike Hanley, Chris Kulers, Michael Cinelli, Frank Honan, and James Stemmerman respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on July 13, 1990.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit of July 13, 1990, reported at 909 F.2d 48, is reprinted in the Appendix at pp. 1a-17a. The District Court's order of February 17, 1988, which is unreported, is reprinted at pp. 18a-20a; its opinion of September 26, 1989, reported at 714 F.Supp. 644, is reprinted at pp. 21a-49a; and its final judgment of September 26, 1989, which is unreported, is reprinted at pp. 50a-56a. The order of the Court of Appeals of August 17, 1990, denying a motion for rehearing, which is unreported, is reprinted in the Appendix at pp. 57a-58a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 13, 1990. A timely petition for rehearing was denied on August 17, 1990.

This petition for certiorari was filed within 90 days of August 17, 1990.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Rule Involved

Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

> **(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under

Rules 12 and 56 or any other motion except as provided in Rule 41(b).

Statement of the Case

The Nature of the Case

The six petitioners, all of them members of respondent labor organization ("Local 501"), instituted this action against Local 501 and the employers' association with which it is in labor relations ("Chapter"), to vacate an arbitration award and to vacate certain side agreements to the bargaining agreement that Local 501's officers had entered into in the name of Local 501, in obedience to the arbitration award but without authority from the Local or its membership.

Jurisdiction was asserted under § 10 of the Arbitration Act, 9 U.S.C. § 10, § 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a), and

§ 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a).

The Inside Agreement

It is Local 501's long-established practice to require that any collective bargaining agreement negotiated by it be ratified by its membership before it can be effective. Chapter was aware of that practice and, before the events complained of, had been formally notified that Local 501 cannot be bound by an agreement not ratified by its membership.

In June 1986, when the existing, three-year collective bargaining agreement (the "Inside Wiremen's Agreement" or "Inside Agreement") was about to expire, Local 501 and Chapter negotiated a new one. As the expiration date approached, Local 501 announced its intention to strike. It received authorization from its international union to do so.

While negotiations continued, the parties could not agree on all subjects that they discussed. One such subject was a proposal by Local 501 to extend the apprenticeship period to six years and to permit fifth- and sixth-year apprentices to perform certain work at a less-than-journeyman's rate, and for this purpose be known as "Modified Intermediate Journeymen" (or "M.I.J.").

Chapter asked that Local 501's M.I.J. proposal be put aside, for later discussion, so that an overall Inside Wiremen's Agreement could be reached and a strike avoided. Local 501 concurred. The terms of a new Inside Agreement were agreed to and both parties signed a proposed "Final Agreement" itemizing them. The proposed "Final Agreement" was then submitted to a secret ballot ratification vote of the membership at a special

meeting.

At the special meeting, prior to ratification, a member asked Local 501's President, Werle, whether, if a side agreement were subsequently reached on the M.I.J. issue, the members would have an opportunity to ratify or reject it. Werle replied that the membership would have that opportunity.

The members then voted upon, and ratified, the new Inside Agreement.

Local 501 thereafter set out the new Inside Agreement in formal terms and asked Chapter to sign it. Chapter refused, although in fact both sides (including Chapter's employer-members) continued to comply with the Inside Agreement and thus obtain its benefits.

The issue of Chapter's refusal to sign was debated at subsequent meetings

of a joint employer-union committee.[1]

Also at these meetings Local 501 renewed its M.I.J. proposal. Chapter rejected it. Chapter proposed instead what are here referred to collectively as

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[1] Chapter had, of course, signed the "Final Agreement" in June 1986. And, while refusing to sign the formally-prepared agreement, it and its members complied with its terms, thus achieving the benefits of labor peace and availability of union-supplied manpower. It is well established that a bargaining agreement may be valid and binding, even though not be signed or even reduced to writing: see: 36a-37a n. 7 and case cited; see also: Warehousemen's Union Local 106 v. Continental Can Corp., 821 F.2d 1348, 1350 (9th Cir. 1987); NLRB v. Haberman Constr. Corp., 641 F.2d 352, 355-356 (5th Cir. 1981; en banc); Certified Corp. v. Hawaii Teamsters & Allied Workers, 597 F.2d 1269, 1271-1272 (9th Cir. 1978).

the "Residential Agreement."[2] Local 501 rejected that proposal.

The "Residential" Agreement

In April 1987, Local 501 and Chapter jointly submitted to an arbitration body ("the CIR"), the issue of Chapter's refusal to sign the Inside Agreement and distribute it to its employer-members.[3]

On May 18, 1987, the CIR announced a decision which, instead of dealing merely

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[2] These were in fact two companion side agreements, the second termed a "Memorandum of Understanding" (see: 7a). The District Court referred to them as the "small work agreements" (25a).

It should be noted that the Residential Agreement is not an M.I.J. agreement: it does not contemplate that advanced electrician apprentices ("M.I.J.'s") shall perform the work.

[3] The issue submitted was:

> "Employer refuse to formally sign and submit for approval new collective bargaining agreement negotiated on June 13, 1986."

with Chapter's refusal to sign the Inside Agreement, directed both Local 501 and Chapter to execute both it and the Residential Agreement.

Early in June 1987 George Horrigan, Local 501's business manager, received the CIR's decision and, on June 11 and 18, he and Werle executed it with Chapter's representatives. Horrigan and Werle knew that the Residential Agreement was, as Horrigan later put it, "abhorrent" to Local 501's membership.

At a meeting of Local 501's Executive Board on June 22, 1987, Werle told the Board that he had signed the Residential Agreement. Horrigan did not tell it that he had signed it also. Most of the other Board members indicated their opposition to it and asked Horrigan not to sign it or send it to the International union, whose approval was necessary to

give it effect. Later in June 1987, however, Horrigan sent executed copies to the international union.

Prior to Local 501's membership meeting on June 25, 1987, no notice whatever was given Local 501's members of the CIR award, and the only notice given them of the Residential Agreement was a statement, in the announcement of such meeting, that there would be a discussion "on the new residential agreement." Neither before the meeting, nor at the meeting itself, were members told what the "new residential agreement" was. At the members' insistence, however, a special meeting was scheduled for July 7, 1987 to provide information as to what these matters were.

At the special meeting, Werle told the members the substance of the Residential Agreement. However, the members

were not given copies. Nor were they given an opportunity to vote for or against the agreements.

In a petition signed by over 100 fellow members, petitioner Kozera, a member of Local 501, asked Local 501's officers to take action to set aside the CIR award and the Residential Agreement. Local 501's officers and executive board rejected his petition.

Late in July 1987, Local 501 sent members, for the first time, copies of the Residential Agreement and solicited by letter (with return postcards enclosed) their views on it. The postcards returned by members overwhelmingly rejected the Residential Agreement.

Thereafter, Kozera and five other members instituted this action against Local 501 and Chapter.

The District Court's Decisions

By order of February 17, 1988, the District Court found that the CIR award exceeded the scope of the submission and therfore vacated it (18a-20a). Other issues were left for trial.

The Court directed Local 501 and Chapter to resubmit to the CIR the issue originally submitted to CIR (19a). They did so. The CIR responded with a second award, ruling that:

> "Absent a resolution by the parties for residential and small work, the Westchester-Fairfield Chapter is not required to sign the Inside Wiremen's Agreement in question."

At trial, Chapter's officers testified that they knew that no agreement could be entered into by Local 501 without membership ratification. Also, it

was shown that, before the events complained of occurred, Local 501 had advised Chapter, in writing, that its officers do not have authority to bind it to any agreement absent ratification by the membership.

The Court found the Inside Agreement valid and binding (36a) and the Residential Agreement invalid (41a-43a).

It found that Horrigan and Werle's execution of the Residential Agreement was unauthorized by the Union (38a-40a).

The Court also found that Chapter was aware that the Residential Agreement could not be binding absent ratification by the membership, and that Chapter could not have reasonably relied upon the actions of Werle and Horrigan in signing that agreement (41a).

Accordingly, the District Court declared the Residential Agreement void.

Additionally, the District Court dismissed plaintiffs' duty of fair representation claim by holding that, because Werle and Horrigan's conduct was unauthorized by the Local's executive board, such conduct could not be imputed to the Local (46a).

The Court of Appeals' Decision

Chapter appealed from the Court's invalidation of the Residential Agreement, and plaintiffs cross-appealed from dismissal of their breach of duty claims.

On the former issue, the Court of Appeals reversed, holding that "[e]ven though the Residential Agreement had not been ratified by the membership," Chapter could reasonably have believed that Werle and Horrigan had authority pursuant to the arbitration award to bind the union membership (15a).

On the duty of fair representation issue, the Court of Appeals affirmed without comment the District Court's dismissal as against Chapter (see: 16a) and affirmed in part that court's dismissal as against Local 501. The Court held that that the actions of Horrigan and Werle could be attributable to Local 501 only "if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts" (17a).

The Court of Appeals remanded only for the latter determination.

Local 501 filed a timely motion for rehearing which was denied on August 17, 1990 (40a-41a).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has, in violation of Rule 52(a), Fed.R.Civ.P.[4], reversed, without evidentiary basis for doing so, two findings of fact by the District Court, neither of which is clearly erroneous.

The two findings of fact

1. Chapter argued to the District Court that the Inside Agreement was conditioned upon ultimate resolution of the M.I.J. or residential work issue and hence would be invalid if the Residential Agreement was invalid (35a).

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[4] Reference is made to the following sentence of Rule 52(a):

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The District Court rejected that factual contention, however (36a). Contrary to Chapter's argument, it found as fact that both sides had their own reasons for entering into the Inside Agreement -- Chapter's reason being to avoid the possibility of a strike -- and that they had agreed that the residential work issue "could be left to future negotiations" (36a).

The District Court's finding is supported by the evidence. Nevertheless, the Court of Appeals rejected it.

In its place, the Court of Appeals accepted Chapter's factual contention that the parties had conditioned the Inside Agreement upon the parties subsequently agreeing on the residential work issue (6a), so that the Inside Agreement and the Residential Agreement "must rise or fall together" (14a, 15a).

The Court of Appeals sought support for its rejection of the District Court's finding in the second CIR award.

But the CIR's second award held only that Chapter need not sign the formal Inside Agreement absent resolution of the M.I.J. issue; see: page 12, supra. It did not declare the Inside Agreement invalid; see: 37a n.7.

The Court of Appeals did not quote what the second CIR award had said.

Instead, the Court characterized that award as ruling "that the Chapter was justified [in refusing to sign] since the Inside Wiremen's Agreement and Residential Agreement must rise or fall together" (14a) -- thus importing into the award a finding which the CIR did not make and which, had the CIR made it, would have exceeded the scope of the submission (see: fn. 3, page 9, supra).

In short, the theory under which the Court of Appeals rejected the District Court's finding cannot withstand scrutiny. And there are no facts in the record that, under the "clearly erroneous" standard of Rule 52(a), could justify the Court of Appeals' rejection of the District Court's finding.

2. The District Court also found (41a) that, in regard to the Residential Agreement,

> "... it is clear from the evidence presented at trial that the Chapter was aware that ratification by the membership was required, and that it could not have reasonably relied on the actions of Werle and Horrigan which deviated from the past practice of the Union and the Chapter in negotiating collective bargaining agreements."

Plainly, this, like the preceding finding, is a pure finding of fact. And the evidence in the record supports it. Moreover, the CIR's second award appears

to corroborate it.[5]

But the Court of Appeals rejected the District Court's finding and adopted a contrary one.

The Court of Appeals acknowledged that the CIR's first award was properly declared void. It acknowledged also that Horrigan and Werle did not, absent ratification, have actual authority to execute the Residential Agreement.

But the Court ruled that because the first CIR award had purported to direct execution of the Residential Agreement, the Chapter "could reasonably believe" that Local 501's officers "had authority ... to bind the union membership" (15a).

On that ground, the Court of Appeals substituted its own speculative finding

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[5] The award (see: page 12, supra) states or at least implies that resolution of the residential work issue is "absent" -- i.e., that the Residential Agreement is invalid.

as to what the Chapter "could reasonably believe" for the District Court's finding, based on the evidence elicited at trial, as to what Chapter did in fact know and believe.[6]

The meaning of Rule 52(a)

This Court has repeatedly held, in interpreting Rule 52(a), that if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reject its findings; cf. Amadeo v. Zant, 486 U.S. 214, 223 (1988); Anderson v. City of Bessemer City, 470 U.S. 564, 573-574 (1985); United States v. National Ass'n of Real Estate Boards, 339 U.S.

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[6] Compare: NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 35 (1967): "[T]he Court of Appeals misconstrued the function of judicial review when it proceeded nonetheless to speculate upon what might have motivated the company." (Emphasis in original.)

485, 495-496 (1950); Citibank N.A. v. Wells Fargo Asia, Ltd., ___ U.S. ____, 109 L.Ed.2d 677, 689, 110 S.Ct. 2034, 2040-2041 (May 29, 1990). See also: 9 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2585 (1971).

The authority of an appellate court is circumscribed by "the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence"; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).[7]

Because, in this case, the District Court's findings were not clearly erroneous, the Court of Appeals, in rejecting

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[7] This is especially so when the district court's finding is based upon credibility determinations. See: Graver Tank & Mfg. Co. v. Linde Air Products Co., 366 U.S. 271, 274 (1949); United States v. Oregon State Medical Society, 343 U. S. 326, 332 (1952); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2586 at n. 15, 16 (1972).

them, violated Rule 52(a) -- and thus departed from the accepted and usual course of judicial proceedings.

II.

The Courts below, by holding that a breach of duty of fair representation committed by a labor union's officers is not attributable to the union if "unauthorized," and that the employer is not liable for its participation in that breach, have decided a federal question in a way in conflict with applicable decisions of this Court.

The duty of fair representation

This Court has long ago established that once a labor organization has become clothed by our labor laws with the statutory powers of an exclusive bargaining representative, it is subject also to the duty of representing employees fairly, without hostile discrimination or arbi-

trary conduct; cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 198, 202 (1944); Vaca v. Sipes, 386 U.S.171, 177 (1967). In negotiating with an employer, it "is responsible to, and owes complete loyalty to, the interests of all whom it represents"; Ford Motor Company v. Huffman, 345 U.S. 330, 338 (1953).

And the progeny of Steele, Vaca and Huffman have made it clear that where a labor organization enters into a bargaining agreement harmful to the employees represented and, contrary either to past practice or to its constitutional provisions, denies them an opportunity to vote on ratification of the agreement, it violates its duty of fair representation. Cf. Trail v. Int'l Br'd of Teamsters, 542 F.2d 961, 968 (6th Cir. 1976); Int'l Br'd of Teamsters, Local 310 v. NLRB, 567 F.2d 1176, 1182 (D.C.Cir. 1978); Frenza

v. Sheet Metal Workers, 567 F.Supp. 580, 586-587 (E.D.Mich. 1983).

Local 501's breach of duty

In this case, there is no real doubt that the actions of Horrigan and Werle constitute a breach of the duty of fair representation. Both courts have acknowledged that they do constitute such a breach.

The District Court found that in executing the Residential Agreement, Horrigan and Werle acted without authority, "abused the authority conferred upon them by the membership" (46a), and acted in violation of their duties.

The Court recognized that if the actions of Horrigan and Werle are attributable to Local 501, they constitute a breach of its duty of fair representation. It therefore held that the issue of whether the Union breached its duty of

of whether the Union breached its duty of fair representation turns upon whether their conduct "can be properly attributed to the Union" (45a).

And the Court of Appeals acknowledged (16a) that the actions of Horrigan and Werle

> ... may also have constituted a breach of the officers' obligation, as part of their duty of fair representation, to go to the membership with the issue whether to challenge the CIR award in court or to abide by the arbitration order.

The issue on which the courts below have erred, therefore, is not whether there was a breach of duty. It is whether Local 501 is liable for that breach -- and whether Chapter is liable for participation in it.

It is in their decision of that issue that the courts below have decided a federal question in a way in conflict with applicable decisions of this Court.

Local 501's liability

The District Court held that the actions of Horrigan and Werle were not attributable to Local 501 if the Local's executive board or membership did not authorize those actions. And the Court of Appeals endorsed that theory by limiting the issue on remand to whether or not Local 501 failed to adopt "adequate procedures" to guard against such a breach.

Those holdings are sharply in conflict with the law as found in the decisions of this Court.

A principal's liability for the torts of his agent rests upon the doctrine of respondeat superior -- so long as the servant was acting, as Horrigan and Werle surely were, within the scope of his employment. Cf. Richards v. Attorneys' Title Guar. Fund, Inc., 866

F.2d 1570, 1572 (10th Cir. 1989), cert. denied, ___U.S. ___, 109 S.Ct. 3189, 105 L.Ed.2d 697 (1989) A.L.I., Restatement of Agency (Second), § 219(2)(c) & (e), and comment e.

In accordance with that doctrine, this Court has recently held that a labor union is therefore liable for acts of its business agent, within the scope of his employment, which constitute a breach of the union's duty of fair representation; see: Breininger v. Sheet Metal Workers, _ _ U.S. ___, 110 S.Ct. 424, 435 n. 9, 107 L.Ed.2d 388, 408 n. 9 (Dec. 5, 1989) -- even where the business agent was pursuing a "personal vendetta"; Ibid, 110 S.Ct. at 440, 107 L.Ed.2d at 413-414.[8]

Indeed, subjecting unions to common law liability for the torts of their

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[8] Breininger was cited, and the above argument presented, in petitioners' brief to the Court of Appeals.

officers and business agents was a principal object of the Taft-Hartley amendments to the National Labor Relations Act; see: Millis & Brown, FROM THE WAGNER ACT TO TAFT-HARTLEY, 498-499 (1950); Local 814, ILA v. NLRB, 735 F.2d 1384, 1394 n. 15 (D.C.Cir. 1984) (quoting Sen. Taft's explanation of § 2(13) added, by amendment, to the National Labor Relations Act, 29 U.S.C. 152(13)).

So far as Local 501's liability for the actions of Horrigan and Werle is concerned, it is therefore of no matter whether the executive board knew of or approved them; for the principal's knowledge of his agent's tort is not a necessary element of liability; cf. Stockwell v. United States, 80 U.S. 531, 546, 549-550 (1871).

The Chapter's liability

An employer's liability for a union's breach of duty stems from the employer's participation in that breach.

Such liability is obviously necessary, where the union has entered into a bargaining agreement in violation of its duty; cf. Steele, supra, 323 U.S. at 203 ("No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited from making"). And see: Glover v. St. Louis-San Francisco R. Co., 393 U.S. 324, 329 (1969) ("the employer is made a party to insure complete and meaningful relief").

And the employer who participates in the labor organization's breach may be liable in damages as well; cf.: Czosek v. O'Mara, 397 U.S. 25, 29 (1970). And see: Chambers v. Local 639, 578 F.2d 375, 383

(D.C.Cir. 1978); Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974).[9] As the Fifth Circuit observed in Richardson v. Texas & New Orleans R. Co., 242 F.2d 230, 236 (1957),

> Unless financial responsibility for a joint breach of such duty is required from both sides of the bargaining table, the statutory policy implied in Steele will be impracticable of enforcement.

Dismissal of plaintiff's claim against the employer, Chapter, is therefore contrary to these well-established principles.

The District Court found (40a-41a), and the evidence clearly establishes, that Chapter was aware that Horrigan and Werle's execution of the Residential Agreement was a violation of their duties

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[9] It should be pointed out that the employers' liability in the cases cited is founded, not upon violation of a bargaining agreement, but upon its participation in the union's breach of duty, e.g. in negotiating the agreement.

and that Chapter's representatives participated in that violation.

Indeed, the evidence established that Chapter's representatives were present when Werle and Horrigan signed the Residential Agreement.

Under these circumstances, therefore, it does not matter that Chapter was "seeking to promote its own interest" (see: 46a n. 10); for it is clear that Chapter's officers knew of, sought to gain from, and participated in Local 501's breach of duty to the employees represented.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 983, 1152—August Term, 1989

(Argued March 28, 1990 Decided July 13, 1990)

Docket Nos. 89-9072, -9160

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN, and JAMES STEMMERMAN, each individually and as a member of LOCAL UNION 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and each on behalf of all persons members of LOCAL UNION 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

—v.—

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and DONALD WERLE as President and DOUGLAS REID as Treasurer of Local Union 501, IBEW,

Defendants,

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.

Defendant-Appellant,

LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendant-Appellee,
Cross-Appellee.

Before:

OAKES, *Chief Judge,*
WINTER, *Circuit Judge,* and MUKASEY, *District Judge.*[1]

Appeal from September 28, 1989, judgment of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge,* that declared void a purported addendum to a collective bargaining agreement, found employer association in breach of the underlying agreement through implementation of the terms of the addendum, and held that local union could not be held liable for any potential breach in the duty of fair representation on the part of union officers. *Held*: District Court too summarily dismissed findings of arbitrator in vacating the addendum and enforcing the underlying agreement against the employer association.

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1 Of the Southern District of New York, sitting by designation.

Judgment reversed in part and vacated in part. Cause remanded as to union members' fair representation claim against local union.

JOSEPH J. STEFLIK, Twining, Nemia, Hill & Steflik, Binghamton, NY, *for Defendant-Appellant Westchester-Fairfield Chapter of National Electrical Contractors Association.*

GARY L. LIEBER, Porter, Wright, Morris & Arthur, Washington, DC (Lawrence J. Cohen, Richard M. Resnick, Sherman, Dunn, Cohen, Leifer & Counts, P.C., Washington, DC, of counsel), *for Amici Curiae National Electrical Contractors Association, Inc. and International Brotherhood of Electrical Workers, AFL-CIO.*

BURTON H. HALL, Hall & Sloan, New York, NY, *for Plaintiffs-Appellees-Cross-Appellants.*

RALPH P. KATZ, White Plains, NY, *for Defendant-Appellee Local Union No. 501, IBEW.*

OAKES, *Chief Judge*:

The Westchester-Fairfield Chapter ("the Chapter") of the National Electrical Contractors Association, Inc.

("NECA"), appeals a September 28, 1989, judgment of the United States District Court for the Southern District of New York, John E. Sprizzo, Judge, declaring void a purported addendum to a collective bargaining agreement and finding the Chapter in breach of the underlying collective bargaining agreement through its implementation of the terms of the addendum. Plaintiffs, six members of Local Union 501 ("the Local Union") of the International Brotherhood of Electrical Workers ("IBEW"), acting individually and on behalf of all other similarly situated members of the Local Union, cross-appeal the district court's dismissal of their claims against the Local Union for breach of the union's duty of fair representation arising out of the Local Union officers' signing of the addendum without prior disclosure to the membership, and the district court's denial of their motion for class certification. The district court's judgment followed a bench trial and was entered pursuant to an opinion and order dated May 30, 1989, and reported at 714 F. Supp. 644 (S.D.N.Y. 1989).

We disagree with the district court's holding that the underlying collective bargaining agreement was valid but that the addendum was not binding upon the parties. Concluding instead that both the underlying agreement and the addendum were final and binding, we reverse the district court's imposition of liability upon the Chapter for its implementation of the terms of the addendum to the collective bargaining agreement. We moreover vacate the district court's dismissal of plaintiffs' claims against the Local Union, and remand for further proceedings on this issue.

This case requires us to consider the proper role of labor arbitrators and courts in construing the validity of

collective bargaining agreements that leave hotly-contested issues open for future negotiation by the parties. Appellant, the Westchester-Fairfield Chapter, is a local affiliate of NECA, a national trade association comprised of electrical contractors that is served through 127 local chapters chartered by and affiliated with the national association. The primary function of these local chapters, including of the Westchester-Fairfield Chapter, is to act as multi-employer associations for the negotiation and administration of collective bargaining agreements on behalf of local electrical contractors who authorize the chapters to act as their collective bargaining agents. The Westchester-Fairfield Chapter represents electrical contractors who perform work in Westchester County, New York, and Fairfield County, Connecticut, and has a long collective bargaining history with appellee Local Union 501, which represents workers who perform inside electrical work in Westchester and Fairfield counties.

The collective bargaining relationship between the local NECA chapters and the IBEW local unions has been a successful one throughout the industry; integral to this success has been the Council on Industrial Relations for the Electrical Contracting Industry ("CIR"), a national arbitration body composed of an equal number of IBEW and NECA representatives (and their local affiliates) that adjudicates local grievances and contract negotiation disputes throughout the electrical contracting industry. The CIR generally derives its authority to hear disputes pursuant to the provisions of many local collective bargaining agreements which designate CIR as the dispute-resolution body.

On June 13, 1986, the eve of an impending strike, Local Union 501 and the Westchester-Fairfield Chapter reached an "Inside Wiremen's Agreement" that modified and extended for three years (until May 1989) the terms of a previous collective bargaining agreement that had governed the parties' relationship from 1983-86. The Inside Wiremen's Agreement was labelled "Final Agreement" and was in the form of a two-page handwritten memorandum listing the modifications of the previous agreement. To facilitate quick agreement and thereby avert the impending strike by Westchester electrical workers, however, the Chapter and the Local Union left open for future negotiation a proposal, among others, that would aim to make union electricians and Chapter employers more competitive in the market for residential electrical work by allowing Chapter employers to modify the wage rate paid to union electricians performing such work. However, the Local Union and the Chapter did "agree to agree" on such a proposal at a future time. In fact, the handwritten memorandum provided that the 1986-89 Inside Wiremen's Agreement would include a memorandum of understanding concerning residential work. Members of the Local Union ratified the 1986-89 Inside Wiremen's Agreement on June 19, 1986.

Despite protracted negotiations continuing from June 1986 to April 1987, the Local Union and the Chapter were unable to come to agreement as to the various residential work proposals. The Local Union, having recently had its jurisdiction over workers performing "outside" line work[1] taken away by the international

1 "Outside work" generally refers to electrical work performed on outdoor utility lines, streets, and poles, while "inside work" refers to

office of the IBEW and transferred to another local, began fearing that its failure to have secured a signed agreement with the Chapter as to inside work could result in a further removal of its representative status or jurisdiction. Accordingly, the Local Union began pressing the Chapter in April 1987 to sign formally the version of the Inside Wiremen's Agreement that had been negotiated in June 1986. The Chapter refused to do so, claiming that an agreement as to the residential work was a condition precedent to the validity of the Inside Wiremen's Agreement. The Local Union argued that the June 1986 Inside Wiremen's Agreement was binding notwithstanding the lack of agreement as to residential work.

After reaching an impasse, the Local Union and the Chapter jointly submitted the issue of the validity of the Inside Wiremen's Agreement, absent a residential work agreement, to arbitration before the CIR. On May 18, 1987, the CIR, apparently finding that the Inside Wiremen's Agreement was inseparable from any agreement as to the residential work issue, handed down its decision instructing the parties to sign the Inside Wiremen's Agreement as well as a Residential Agreement that had been previously proposed by NECA's and IBEW's national organizations but rejected by the Local Union. Under this Residential Agreement and its accompanying Memorandum of Understanding, Chapter employers were free to pay employees nearly half their normal wage rate in jobs involving electrical work in "residential occupancy dwellings" and in all other jobs involving

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electrical work performed within dwellings. Prior to removal of its outside line jurisdiction, the Local Union had represented both inside wiremen and outside wiremen for over 80 years.

"all electrical systems up to a maximum total electrical value of $75,000"; Chapter employers also could hire directly any employees for such work, without first receiving referrals from the Local Union.

Shortly after the CIR rendered its decision, the president and business manager of the Local Union signed the Residential Agreement on June 11 and June 18, 1987, respectively, but without first notifying or seeking the approval of the executive board or of union members. The president and business manager continued to conceal the fact of their signatures until the June 22, 1987, special meeting of the executive board, at which time it was revealed that the president had signed the Residential Agreement, but not that the business manager also had signed the Agreement. The executive board informally voted at that meeting that the Local Union should take legal action to vacate the CIR award, and urged the business manager not to sign the Residential Agreement. However, the Local Union's officers chose not to challenge the CIR award. They, together with executive board members, testified at trial that the officers had expressed grave doubts at the June 22, 1987, meeting as to the consequences of challenging the award. Having already had some of their jurisdiction removed by the international office of the IBEW, the officers apparently feared that such a challenge would be tantamount to challenging the International, both since the International selected the union members on the CIR, and since the Residential Agreement had been negotiated by the International and the national office of NECA.

The president and business manager of the Local Union also withheld the fact of the CIR award and their

signature of the Residential Agreement from the membership of the Local Union. Although the award and Agreement were briefly mentioned at the June 25, 1987, membership meeting, discussion of the contents was not fully held until the special membership meeting on July 7, 1987, well after the Residential Agreement had been signed. In fact, despite the petition by Local Union members urging the officers to challenge the CIR award and Residential Agreement, the president and business manager of the Local Union submitted the Residential Agreement, pursuant to Local Union practice, for approval by the international office, which they in turn received. Although the Residential Agreement was never ratified by the Local Union's members, Chapter employers treated it as valid and began implementing its terms.

Six members of the Local Union initiated this action in July 1987 to nullify the Residential Agreement, to obtain damages from the Local Union for its alleged breach of its duty of fair representation arising out of the Local Union's entering into the Residential Agreement, and to obtain damages from the Westchester-Fairfield Chapter for violating the underlying collective bargaining agreement (the Inside Wiremen's Agreement) by putting into effect the purportedly invalid and unratified Residential Agreement. On February 17, 1988, the district court vacated the CIR award on grounds that the arbitrator had exceeded its delegated authority in instructing the parties to sign the Residential Agreement. Holding that the only issue properly before the arbitrator had been whether the Chapter was justified in refusing to sign the Inside Wiremen's Agreement absent agreement on residential work, the district court remanded the issue to the arbitrator and scheduled the plaintiffs' claims for trial.

The parties resubmitted their dispute to the CIR on March 31, 1988. The CIR issued a revised decision on April 8, 1988, in which it ruled that "[a]bsent a resolution by the parties for residential and small work, the Westchester-Fairfield Chapter, NECA is not required to sign the Inside Wiremen's Agreement in question." Nevertheless, following trial, the district court on May 30, 1989, concluded that the two agreements—the underlying Inside Wiremen's Agreement and the Residential Agreement—were separable. Holding that the Residential Agreement was not valid since the president and business manager of the Local Union had no actual or apparent authority to sign the document, the district court still found the underlying Inside Wiremen's Agreement to be binding. Accordingly, the district court found the Chapter to be liable for violating the Inside Wiremen's Agreement by implementing the unauthorized provisions of the Residential Agreement. Although the court also found the union agents' acts to be unauthorized, it dismissed plaintiffs' claim against the union on grounds that the unauthorized acts of its agents could not be attributed to the union.

The Chapter appeals from the district court's imposition of liability upon it and the vacation of the Residential Agreement, and plaintiffs cross-appeal from the court's denial of their claim against the Local Union.

DISCUSSION

1. *Validity of Inside Wiremen's Agreement and Residential Agreement*

As a threshold matter, we must address whether a federal court has jurisdiction to determine the validity of

a collective bargaining agreement. Appellant contends that although a federal court has jurisdiction, pursuant to 29 U.S.C. § 185(a) (1988), to decide actions alleging violations of an agreement between a union and an employer, it lacks power to rescind or invalidate agreements between an employer and a union. It is axiomatic, however, that to determine whether a breach of agreement has occurred, a court must necessarily determine whether a valid agreement exists in the first place. Ancillary to determining the merits of an action for breach of a collective bargaining agreement, therefore, is the power to declare a purported agreement either invalid or binding. Not surprisingly, therefore, the Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits all allow a district court to determine the validity of a collective bargaining agreement as part of the power to determine whether there has been a breach. *See IBEW, Local 481 v. Sign-Craft, Inc.*, 864 F.2d 499, 501-02 (7th Cir. 1988); *Mack Trucks, Inc. v. International Union, UAAAIW*, 856 F.2d 579, 586-90 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1316 (1989); *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1768 (1989); *McNally Pittsburg, Inc. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 812 F.2d 615, 617-19 (10th Cir. 1987); *Board of Trustees v. Universal Enters.*, 751 F.2d 1177, 1184 (11th Cir. 1985); *United Steelworkers of America v. Rome Indus., Inc.*, 437 F.2d 881, 882-83 (5th Cir. 1970). We do likewise.

Turning to the validity of the Inside Wiremen's Agreement and/or the Residential Agreement, we begin with several cardinal rules regarding judicial review of an arbitrator's decision. It is well established that particularly in the context of labor relations, private resolu-

tion of disputes is preferable to litigation. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. . . . [A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

Although a district court may vacate the findings of an arbitrator if it concludes that the arbitrator decided an issue beyond the scope of his or her delegated authority, *see United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960); *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 281-82 (1st Cir. 1983), the presumed authority of an arbitrator to resolve issues is broad, and courts expansively interpret the scope of an arbitrator's delegated authority by resolving doubts in favor of arbitrability. *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Transit Mix Concrete Corp. v. Local Union No. 282*, 809 F.2d 963, 968 (2d Cir. 1987).

We apply these principles to conclude that although the district court properly found that the CIR exceeded its authority by requiring the parties to sign the Residential Agreement as part of its May 18, 1987, award, the district court, in upholding the validity of the Inside Wiremen's Agreement but not of the Residential Agreement, too summarily dismissed the CIR's April 8, 1988, decision finding that the two agreements must rise or fall together.

a. *District Court's Vacation of First CIR Decision*

We conclude that the CIR went beyond its delegated authority in its first award by requiring the parties to sign the Residential Agreement, because the parties delegated to the CIR only the power to decide the validity of the Inside Wiremen's Agreement, not of the Residential Agreement. In their joint submission form, the parties concededly framed the issue before the CIR in very unspecific terms: "Employer refuse [*sic*] to formally sign and submit for approval new collective bargaining agreement negotiated on June 13, 1986. This matter is being jointly submitted under Article 1, Section 1.04(d) for adjudication [contract provision for grievance arbitration rather than interest arbitration]." However, in its brief to the CIR, the Local Union framed the issue as follows: "[W]e are asking Council to mandate that the Inside Wiremen's Agreement be signed *AS NEGOTIATED* and submitted for approval immediately." The Chapter's brief framed the issue jointly submitted to the CIR more broadly:

> The Employers request of the C.I.R. is that a decision be rendered that would require immediate implementation of the [Residential] Agreement and Memorandum [of Understanding accompanying the Agreement] prepared and presented by the Third District Office of the I.B.E.W. and the Eastern Regional Office of N.E.C.A.

Were we to conclude that the CIR could properly consider the issue as framed by the Chapter's brief, we would have no trouble finding that the CIR acted within its delegated authority. However, given that the joint submission form only mentioned the validity of the

Chapter's refusal to sign the "agreement negotiated on June 13, 1986"—i.e., the Inside Wiremen's Agreement—we think the CIR improperly allowed the Chapter to change the scope of the submission unilaterally in also considering whether the specific Residential Agreement negotiated by the national office of NECA and the international office of the IBEW could be imposed on the Local Union. The district court accordingly properly vacated the first CIR award.

b. *District Court's Vacation of Residential Agreement and Enforcement of Inside Wiremen's Agreement*

Nevertheless, the district court's vacation of the Residential Agreement, combined with its enforcement of the Inside Wiremen's Agreement, demonstrates an erroneous disregard of the CIR's second decision dated April 8, 1988. Upon remand from the district court order vacating the first award and directing the panel to consider solely whether the Chapter's refusal to sign the Inside Wiremen's Agreement was proper, the CIR ruled that the Chapter was justified since the Inside Wiremen's Agreement and Residential Agreement must rise or fall together. In concluding that the agreement on residential work was fundamental to the existence of a collective bargaining agreement, the CIR presumably drew on its experience in analyzing the significance of the industry-wide dispute over contractors' lack of competitiveness in the residential market. The district court's disregard of the CIR's conclusion too sweepingly usurped the authority of the arbitrator to resolve issues clearly before it. As noted above, a district court's disagreement with an arbitrator's factual findings is an insufficient basis for vacating the arbitrator's award. Accordingly, we find unsupported the district court's

holding that the Inside Wiremen's Agreement may be enforced even absent the Residential Agreement, and uphold the CIR's second decision concluding that the two agreements must rise or fall together.

Having found that the two agreements must rise or fall together, the next question becomes whether both agreements should be enforced or declared invalid. Although we decline to uphold both agreements on grounds of the first CIR award, which we previously stated exceeded the CIR's authority, we do find that both may be enforced on grounds that they were signed by the Local Union and the Chapter. Because the officers of the Local Union could have declined to sign the agreements and instead have challenged the first CIR award, we do not think it unwise to bind the officers to their signatures.

Even though the Residential Agreement had not been ratified by the membership, we conclude that, notwithstanding the issue of the duty of fair representation and disclosure owed by the Local Union's president and manager to the membership, the Chapter could reasonably believe that officers of the Local Union had authority pursuant to the arbitration award to bind the union membership. *See NLRB v. Local 815, Int'l Bhd. of Teamsters*, 290 F.2d 99, 103 (2d Cir. 1961) (Friendly, J.) (a union may be responsible for the actions of its agents if third parties dealing with the agents reasonably believe the acts to be authorized); *see also Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989) (same); *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1112-14 (6th Cir. 1986) (same), *cert. denied*, 479 U.S. 1086 (1987). That the CIR award itself may have been legally challengeable by the

Local Union does not affect the authority of Chapter members to act pursuant to it, once the union officers carried out its terms rather than seeking to have the award vacated. Because the Chapter had no reason to doubt the authority of union officers to comply with an arbitration order, we think that both the Inside Wiremen's Agreement and Residential Agreement are binding upon the Local Union.

2. *Plaintiffs' Claim Against Chapter*

Because the Residential Agreement is binding, we conclude that the Chapter is not liable to members of the Local Union for implementing its terms, in breach of the terms of the Inside Wiremen's Agreement. We furthermore note that once we upheld, as we have, the second CIR decision holding that the Inside Wiremen's Agreement and Residential Agreement must rise or fall together, we could not have found the Chapter in breach. Even if we had found both agreements to be invalid, the Chapter could not be liable since there would be no valid agreement for the Chapter to have breached. And if both agreements were held valid (as we have done), then the Chapter could not be liable for implementing the terms of both.

3. *Plaintiffs' Claim Against Local Union*

Although the Local Union officers' signatures may have bound the union with regard to the Chapter, their actions nevertheless may also have constituted a breach of the officers' obligation, as part of their duty of fair representation, to go to the membership with the issue whether to challenge the CIR award in court or to abide by the arbitration order. The district court denied plaintiffs' claims against the Local Union on grounds that

any unauthorized actions or breaches of the duty of fair representation on the part of the officers could not be attributable to the union. Yet we conclude that if the acts of the president and business manager are found to violate the union's duty of fair representation, such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts. *Cf. American Soc. of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) (finding nonprofit organization liable for acts of agent since "without any meaningful safeguards, [the organization] entrusted the interpretation of one of its codes to [agent]" (footnote omitted)). Because we think this issue requires further factual amplification, we vacate the district court's finding that the Local Union may not be held liable for any potential breach of the duty of fair representation by its agents and remand for a determination of whether the agents' actions constituted a breach, and whether such breach might have been avoided through institution of proper safeguards. The district court on remand should also consider plaintiffs' motion to be certified as a class.

Judgment reversed in part and vacated in part. Cause remanded as to plaintiffs' claim against the Local Union.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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TED KOZERA, et al.,

Plaintiffs, 87 Civ.5540 (JES)

-against-

ORDER

WESTCHESTER-FAIRFIELD CHAPTER, et al.,

Defendant(s).

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The above-captioned action having come before the Court, and plaintiffs having moved for certification as a class, for vacatur of an arbitration award, and for summary judgment, and defendant Westchester-Fairfield Chapter of NECA having cross-moved for summary judgment, and the Court having heard Oral Argument on these motions on February 16, 1988, and the Court having considered all issues raised at that Oral Argument and in all papers submitted, and the Court having reserved

decision on the motion for class certification, and for the reasons set forth on the record, it is

ORDERED that the Council on Industrial Relations arbitration award dated May 18, 1987 be and hereby is vacated, and it is further

ORDERED that the issue previously submitted for arbitration shall be submitted again to the Council on Industrial Relations for decision, and it is further

ORDERED that the motion and cross-motion for summary judgment are in all other respects denied, and it is further

ORDERED that all parties shall complete discovery on or before March 16, 1988, and it is further

ORDERED that a Pre-Trial Order shall be prepared in accordance with the Court's directions and shall be filed on or before April 4, 1988, and it is further

...

ORDERED that if the Pre-Trial Order is not filed on the date hereinbefore set forth, the Court will entertain appropriate applications to dismiss or for a default, and it is further

ORDERED that all parties shall be ready for trial of the above-captioned action on April 18, 1988, and that thereafter counsel for all parties shall be prepared to proceed to trial on twenty-four hours notice by the Court, and it is further

ORDERED that a Pre-Trial Conference shall be held on July 15, 1988 at 4:30 P.M.*

Dated: New York,New York

February 17, 1988

s/ JOHN E. SPRIZZO
John E. Sprizzo
United States District Judge

* PARTIES NEED NOT APPEAR IF CASE HAS ALREADY BEEN TRIED OR SETTLED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

TED KOZERA, et al.,

Plaintiffs,

87 Civ.5540 (JES)

-against-

OPINION AND ORDER

WESTCHESTER FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., LOCAL 501, et al.,

Defendants.

----------x

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SPRIZZO, D.J.;

Plaintiffs, six members of Local 501 of the International Brotherhood of Electrical Workers ("Local 501"), bring this action against the Westchester-Fairfield Chapter of the National Electrical Contractors Association, Inc. ("the Chapter"), Local 501 and the president, Donald Werle, and treasurer, Douglas Reid, of Local 501.

In general, plaintiffs allege that the Chapter breached the collective bargaining agreement entered into between its members and the members of Local 501. Plaintiffs also allege that Local 501

breached its duty of fair representation by entering into certain ancillary agreements without membership approval. To remedy these alleged wrongs plaintiffs seek a declaration that certain side agreements described below are void and seek damages from both Local 501 and the Chapter.

The case was tried to the Court. Thus, the following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

BACKGROUND

Local 501 is an affiliate of the International Brotherhood of Electrical Workers ("IBEW") and represents its members, including plaintiffs, in collective bargaining with the Chapter, an affiliate of the National Electrical Contractors' Association ("NECA"), whose membership is made up of individual electrical contrac-

tors.

Local 501 had previously negotiated several collective bargaining agreements covering inside wiremen, known as "inside wiremen's agreements." Local 501 had always required a vote of the members ratifying such agreements before they could be put into effect. In June of 1986 the latest of these agreements was due to expire and the parties,the Chapter and Local 501, entered into negotiations to reach a new agreement. See Proposed Pre-Trial Order ("PTO") at ¶ 5(6).[1] Under threat of a strike, an agreement was reached on June 13, 1986 and was ratified by the membership of Local 501 on June 19, 1986, but was not signed by the Chapter.

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[1] The paragraphs of the PTO cited in this opinion refer to undisputed facts.

This agreement (the "main agreement") also indicated that the parties would seek to negotiate side agreements (the "small work" agreements) governing the employment of a new class of journeymen electrical workers and new classes of residential work that would allow certain jobs to be performed by certain workers at lower wage rates.[2] See EX. 7; Trial Transcript ("Tr.") at 612-13, 626, 658. The Chapter presented its proposals for these side agreements, known collectively as small work agreements, at a meeting held on

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[2] The small work agreements vary from the inside wiremen's agreement, inter alia, in the following respects. The small work agreements require an eight hour day as opposed to the seven hours required by the main agreement. In addition, the small work agreements provide for a wage rate less than half that required by the main agreement, and allow the employer to obtain employees without going through the normal union referral process. Compare ex. 7, the main agreement, with Exs. 65 & 66, the small work agreements.

April 27, 1987. See PTO at ¶ 5(10). These proposals were neither signed nor ratified by the members of Local 501. See Tr.at 78, 271-72.

Because the Chapter continued to refuse to sign the inside wiremen's agreement, both parties agreed to submit their disputes to arbitration before the Council on Industrial Relations ("CIR"). See PTO at 5(12). On May 18, 1987 the arbitrator handed down a decision which directed the parties to sign both the main agreement and the small work proposals made by the Chapter. See PTO at ¶ 5(13); Ex. 58. This award was later vacated by this Court on the ground that it went well beyond the issues that the parties had agreed to submit to the arbitrator. See Order dated February 17, 1988.

Donald Werle and Michael Horrigan learned of the aforesaid award in early

June of 1988. As president and business manager of the Union, Werle and Horrigan had been actively involved in the negotiations with the Chapter. Although they both signed the small work agreements on behalf of the Local on June 11 and June 18, 1987 respectively, see PTO at ¶ 5(14), these agreements were never submitted to the membership of Local 501 for ratification, nor were they ever approved by the Local's executive board. See Tr.at 66, 78, 271-72.

On June 22, 1987, the Local's executive board met and discussed the arbitration award. Present at that meeting was the Local's attorney Ralph P. Katz who advised the board to refrain from sending the agreements to the IBEW for approval and to attempt to have the arbitrator's award judicially vacated. See Tr. at 2, 95, 101, 110-11. At the June 22 meeting,

defendant Werle informed the board that he had already signed the agreements. Horrigan did not so inform the board. See Tr. at 95-96, 111, 230. Despite indications from the board that they should seek to have the award vacated, Horrigan sent the agreements to the IBEW for approval on June 24 or June 25. See Tr.at 257-58.

The members of Local 501 were not informed of the arbitrator's award until the June 25 membership meeting. See Tr. at 71, 152-53. Even then only a cursory mention was made of the existence of the small work agreements. See Ex. 62; Tr. at 73-74, 153-55. Upon the insistence of the members, however, a special meeting was called for July 7, 1987 to discuss the small work agreements. Tr. at 75, 154. At that meeting a question and answer session was held, but the question of whether the Local should seek to have the award vaca-

ted was never put to the members. Tr. at 282-289.

However, at the next regular membership meeting, plaintiff Kozera presented a petition signed by 104 members asking the board to bring suit to vacate the award. See PTO at ¶ 5(16); Tr. at 157-59, 284-85. This petition and the threat of a lawsuit by the members prompted Horrigan to take his own poll of the membership, but was apparently not enough to cause Local 501 to then take legal action. Thereafter, following commencement of this lawsuit, Local 501 joined in plaintiffs' effort to have the arbitrators' award vacated.

Meanwhile, the Chapter and its members were busy implementing the newly signed small work agreements. See Tr. at 682-83. Thus, at least some of the Chapter's members have hired people as provi-

ded in the small work agreements and have paid them the lower wages allowed by those agreements. Tr.at 684-85.

Plaintiffs contend that by failing to submit the small work agreements for ratification, by failing to challenge the arbitrator's award, and by failing to timely inform the members of the existence and scope of the arbitration award, Local 501 breached its duty of fair representation. In addition, plaintiffs allege that the Chapter aided and encouraged this breach. Plaintiffs also contend that defendant Chapter breached the inside wiremen's agreement by implementing the allegedly invalid small work agreements.[3] For the reasons that follow, the Court

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[3] In addition, Chapter and Local 501 have cross claimed against each other seeking to respectively confirm and vacate the arbitrator's award and asking for compensatory damages and costs in this action.

finds that the small work agreements are invalid, and that the Chapter breached the main agreement, but that the Union did not breach its duty of fair representation.

DISCUSSION

I. Jurisdiction

In order to decide whether the Chapter has breached its collective bargaining agreement with Local 501, this Court must necessarily pass upon the validity of both the main agreement and the small work agreements, since there can be no claim for breach absent a valid contract. A threshold question therefore arises as to whether a federal district court has jurisdiction to determine the validity of a collective bargaining agreement.

Plaintiffs contend that the Court has jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C.

§ 185(a) (1982).[4] Defendants, on the other hand, argue that the question of validity must, in the first instance, be one for the arbitrator. In addition, defendants argue that section 301 by its terms confers subject matter jurisdiction only with respect to actions for breaches of collective bargaining agreements, and does not permit federal courts to determine the validity of such agreements. That argument lacks merit and must be rejected.

The Court is not unmindful of the policies favoring the arbitration of labor disputes. See e.g., Local 150 v. Flair Builders, Inc., 406 U.S. 487 (1972). How-

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[4] 29 U.S.C. § 185(a) states in relevant part that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties....

ever, there can be no question that Section 301 confers jurisdiction on federal courts to determine if collective bargaining agreements have been breached. See Baldracchi v. Pratt & Whitney, 814 F.2d 102 (2d Cir. 1987), cert. denied, 108 S.Ct. 2819 (1988). In order to determine whether a breach has occurred the Court must necessarily determine that a valid collective bargaining agreement exists which could be breached. In sum, the grant of jurisdiction to determine the existence of a breach implicitly confers upon the Court the jurisdiction to determine validity.

Common law principles of contract law also support this view. In every breach of contract action the existence of a valid contract is an essential element. It is, therefore, not surprising that the Third, Fifth, Seventh, Ninth, Tenth and

Eleventh Circuits have held that federal courts have jurisdiction to determine the validity of collective bargaining agreements. See IBEW, Local 481 v. Sign-Craft, Inc., 864 F.2d 499 (7th Cir. 1988); Mack Trucks, Inc. v. Int'l Union, UAAIW, 856 F.2d 579 (3d Cir. 1988); Rozay's Transfer v. Local Freight Drivers, 850 F.2d 1321 (9th Cir. 1988); McNally Pittsburgh, Inc. v. Int'l Assoc. of Iron Workers, 812 F.2d 615 (10th Cir. 1987); Bd. of Trustees v. Universal Enterprises, 751 F.2d 1177, 1184 (11th Cir. 1985); Untied Steelworkers of America v. Rome Indus., Inc., 437 F.2d 881 (5th Cir. 1970). In view of that circumstance, it is reasonable to expect that the Second Circuit, if presented with the issue, would reach a similar conclusion.

II. Breach of Contract

Plaintiff contends that the Chapter breached the main collective bargaining agreement by implementing the small work agreements, which were never ratified by the membership. Defendant Chapter argues, however, that in the absence of a valid agreement on the small work agreements there could be no collective bargaining agreement to breach because those agreements were part and parcel of one collective bargaining agreement.[5]

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[5] Neither party has argued that the dispute as to the severability of the small work agreements from the main agreement is one for the arbitrator to decide under the previous collective bargaining agreement which expired in 1986. The Court will therefore assume, as it must, that the parties have waived any rights they may have had to arbitrate that issue. See Van Ness Townhouses v. Mar Industries, Corp., 862 F.2d 754 (9th Cir. 1988).

The Court rejects the Chapter's claim. The testimony that the Court finds credible establishes that the Chapter entered into the main agreement to avoid the possibility of a strike, while the Union into the main agreement, at least in part, to placate the IBEW.[6] See Tr. at 42-43, 625-26. Moreover, it is clear not only that each side had its own reason for entering into the main agreement, but also that both sides agreed that the issue of small work agreements could be left to future negotiations.[7] See Tr.at 612-13,

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[6] According to the testimony of Horrigan the IBEW was exerting pressure upon the Local to come to an agreement or face undesirable consequences. see Tr. at 534, 537.

[7] While it is true that the arbitrator found on remand that the Chapter should not be compelled to sign the collective bargaining agreement because of the absence of a successfully negotiated small work agreement, the arbitrator did not find that the main agreement was invalid but only that the Chapter was not required to sign it. However, the fail-

626, 658.

Having found that the main agreement is valid, the Court must next consider the issue of whether the implementation of the small work agreement by the Chapter breached the main agreement. Since there could be no such breach if Werle and Horrigan had authority to bind the union to the terms of the small work agreement, the existence or non-existence of that authority is central to the breach of contract claim.

Section 301(b) provides that a union is bound by the acts of its agent. See 29 U.S.C. § 1185(b) (1982). However, that

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ure of a party to sign a collective bargaining agreement does not necessarily affect its validity. Indeed, it is a well established doctrine in federal labor law that a collective bargaining agreement need not be signed to be valid. See American Federation of Television and Radio Artists v. Inner City Broadcasting Corp., 748 F.2d 884, 887 (2d Cir. 1984).

statute has been construed to require that the power of the agent to bind the union be determined in accordance with common law principles of agency. See Carbon Fuel Co. v. Mine Workers, 444 U.S. 212 (1979). Thus, the Court must determine whether the Chapter was entitled to rely upon either the actual or apparent authority of Werle and Horrigan when it implemented the small work agreements.

Actual authority is not established here by any written document. On the contrary, the IBEW Constitution specifically states that only the executive board has the power to act for the membership in between membership meetings. See IBEW Constitution, Art. 19, § 9 (1986). Therefore, only the executive board, not the president or its business manager, had actual authority to bind the Union.

Moreover, the Chapter's contention

that Werle and Horrigan were authorized to sign the small work agreement at the June 22, meeting is not supported by the record. Quite aside from the fact that the so called authorization was allegedly given after the small work agreement had already been signed, the Court finds that the credible testimony establishes that the Executive Board never approved the small work agreement and did not confer any authority nunc pro tunc on Werle and Horrigan, even assuming arguendo that it could have properly done so. See Tr. at 95, 110, 411. It is also clear that the board expressed a preference for taking legal action to vacate the arbitration award which had directed the Union to sign the small work agreement. See Tr.at 95, 110, 411. Moreover, the board was never informed, even at the June 22 meeting, that Horrigan had signed the small work

agreement. See Tr. at 95-96, 111. Given these circumstances, Werle and Horrigan could not and did not have any actual authority to bind the Union.

Nor was the Chapter entitled to rely upon apparent authority. Apparent authority must be established by proof of something said or done by the principal which justifies reasonable reliance on the authority of the agent. See Central States Southeast and Southwest Areas Pension Fund v. Kraftco., Inc., 799 F.2d 1098, 1112 (6th Cir. 1986), cert. denied, 479 U.S. 1086 (1987); Moreau v. James River-Otis, Inc., 767 F.2d 6, 9 (5th Cir. 1985). There is no such proof here. Indeed, past practice, which arguably can support reasonable reliance on apparent authority, demonstrated that Werle and Horrigan could not act in the absence of membership ratification because all prior

agreements between the Chapter and the Union had been submitted to the membership for ratification. Cf. Goclowski v. Penn Central Transport Co. , 571 F.2d 747, 756 (3d Cir 1977); Battle v. Clark Equip. Co., 579 F.2d 1338 (7th Cir. 1978).

In short, it is clear from the evidence presented at trial that the Chapter was aware that ratification by the membership was required, and that it could not have reasonably relied on the actions of Werle and Horrigan which deviated from the past practice of the Union and the Chapter in negotiating collective bargaining agreements.[8] See Tr.at 51-52, 3228-29;

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[8] The fact that the actions were taken in part at the direction of the arbitrator does not change this result. The Chapter was certainly aware and should have been aware that the arbitrator's direction arguably exceeded his powers as this Court has since found.

Similarly there is no legal relevance to the Chapter's argument that federal law does not require ratification of a collective bargaining agreement by

Ex.25. That knowledge belies any claim by the Chapter that its actions were taken in good faith. See Battle, supra, 579 F.2d at 1349-50.

The Court therefore finds that Local 501 did not ratify the small work agreements, that the Chapter was aware both that the agreements had to be ratified by

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the membership absent a provision in the union's constitution or bylaws imposing that requirement. The issue here is not what federal law requires, but whether these officers had actual or apparent authority to bind the union in the absence of ratification in accordance with common law principles of agency. Past practice of the union is, of course, relevant to the issue of apparent authority, especially where, as here, it is not inconsistent with either the Constitution or bylaws of the local or international union, both of which are silent with respect to the need for membership ratification. Moreover, the probative value of that practice with respect to the issue of authority is not diminished by the fact that federal labor law does not require ratification. See Central States, supra, 799 F.2d at 1111.

the membership, that Werle and Horrigan had no actual or apparent authority to bind the Local in the absence of such ratification, and that implementation of those agreements constituted a breach of the inside wiremen's agreement.

III. Breach of the Duty of Fair Representation

Plaintiffs also allege that Local 501 breached its duty of fair representation by failing to submit the small work agreements for ratification, by failing to challenge the arbitrator's award, and by failing to timely apprise the membership of the existence of the award and the signing of the small work agreements. Defendant Local 501, while not taking issue with most of the facts elicited at trial, contends that its actions do not rise to the level of a breach of duty, that it acted under duress, and that

because the acts of Werle and Horrigan were not authorized by the Union those acts cannot give rise to a breach of duty by the Union.

A Union breaches its duty of fair representation when it acts arbitrarily, discriminatorily or in bad faith towards its members. See Ryan v. Pressman's Union, 590 F.2d 451, 455 (2d Cir. 1979); see also American Postal Workers v. American Postal Workers, 665 F.2d 1096 (D.C. Cir. 1981). Actual malice or bad faith is not essential so long as the Union acts with gross disregard or indifference to the rights of its members.[9] See Ryan,

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[9] The Court rejects the Union's argument that the duty only applies to treatment of individual employee grievances. A Union's duty of fair representation encompasses a far broader range of Union misconduct. See e.g., Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); NLRB v. Local 282, 740 F.2d 141 (2d Cir. 1984).

supra, 590 F.2d at 455; NLRB; supra 740 f.2d at 146. However, the breach of duty of good faith must be properly attributed to the Union itself, and cannot be based upon the unauthorized acts of its officers or representatives. It follows that the issue of whether the union can be sued for breaching its duty to the members, like the issue of the validity of the small work agreement, turns upon whether werle and Horrigan's conduct can be properly attributed to the Union.

The Court finds that Werle and Horrigan's conduct cannot be properly imputed to the Union. By the terms of the Union's Constitution and bylaws, only the executive board possessed authority to act on behalf of the Union. See IBEW Constitution, Art. 19, § 9 (1986). Moreover, the Court has already found that the executive board never authorized either the signing

of the small work agreements or the sending of them to the IBEW, and that both of these acts were accomplished without the knowledge of the executive board. See discussion supra, at 11. The Court also finds that the executive board could not have reasonably foreseen that the officers would act as they did. In sum, the Court concludes that the unauthorized conduct of a Union official cannot be the basis for a finding that the Union, as opposed to the officers, has breached a duty to its members, merely because those officers have abused the authority conferred on them by the membership.[10]

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[10] Since the Union did not breach its duty, the Chapter could not, as plaintiffs allege, have participated in that breach. In any event, the Chapter's conduct in seeking to promote its own interest by maintaining its own legal and factual contentions in arms length negotiations with the Union is not legally sufficient to sustain a finding that it aided and abetted the Union's alleged breach. See e.g., Battle v. Clark, 579

IV. Duress

Local 501 has also sought to vacate the small work agreements on the ground that they were obtained by duress. Specifically, the Union contends that in addition to the arbitration award, pressure from the IBEW to reach an agreement and the Chapter's knowledge and use of that pressure forced Werle and Horrigan to sign the agreement. That claim lacks merit.

Since the officers had the option of challenging the arbitrator's award in the Courts rather than signing it, the arbitrator's directive to sign the agreements cannot constitute legal duress. Moreover, the threat of action by the IBEW, whether real or merely perceived, cannot constitute duress because it is not properly attributable to the Chapter. Duress is a

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F.2d 1338 (7th Cir. 1978).

basis to invalidate a contract only when the duress is exercised by the other contracting party, not some third party. See Citibank v. Graphic Scanning Corp., 459 F.Supp. 337 (S.D.N.Y. 1978); Weinraub v. Int'l Banknote Co., 422 F.Supp. 856 (S.D.N.Y. 1976).

The fact that the Chapter stated that it would not sign the main agreement unless Werle and Horrigan signed the small work agreements is a legally insufficient predicate for any claim of duress. A negotiating demand by an adverse party cannot be a sufficient predicate for a claim of duress, since that type of pressure is at the heart of virtually every contractual negotiation. Cf. Weinraub, supra, 422 F. Supp. at 859; Restatement (Second) of Contracts § 492 (wrongful threat is required). This is especially true where, as here, an arbitrator has

upheld the Chapter's refusal to sign the main agreement. It follows that Local 501 has failed to show that Werle and Horrigan signed the small work agreements under duress.

CONCLUSION

For the reasons set forth above, the Court orders the following relief. The small work agreements are hereby declared void and of no effect. The Inside Wiremen's agreement is and shall remain in effect for the remainder of its term. The question of damages, costs and attorneys fees' and class certification shall be taken up at the next conference on June 30, 1989 at 12:30 P.M.

It is **SO ORDERED.**

Dated: New York, New York

May 30, 1989

s/ JOHN E. SPRIZZO
John E. Sprizzo
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN AND JAMES STEMMERMAN, each individually and as a member of Local 501 of International Brotherhood of Electrical Workers, and each on behalf of all persons members of Local 501 of International Brotherhood of Electrical Workers, similarly situated,

Plaintiff(s),

-against-

87 Civ.5540 (JES)

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.; LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; and DONALD WERLE as President and DOUGLAS REID as Treasurer of Local 501, IBEW,

Defendant(s).

FINAL JUDGMENT

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Plaintiffs have brought this action seeking a judgment: (1) vacating the award rendered by the Council on Industrial Relations for the Electrical Contracting Industry in its case number 5345, (2) that the Residential Agreement and Memorandum

of Understanding referred to in said arbitration are void and of no effect, (3) permanently enjoining defendants from implementing the arbitration award and the Residential Agreement and Memorandum of Understanding, (4) declaring that the collective bargaining agreement known as the New Inside Wiremen's Agreement between the defendant Union and the defendant Association is valid and binding, (5) awarding monetary damages, costs, disbursements and attorneys fees. Defendant Association, in its Answer, crossclaimed against the defendant Union seeking a judgment (1) confirming the arbitration award, (2) directing compliance with the Residential Agreement and Memorandum of Understanding, and (3) compensatory damages. The Association also sought costs, disbursements, and reasonable attorneys fees. Defendant Union, in its Answer, cross-claimed

against Defendant Association seeking a judgment (1) vacating the arbitration award, (2) declaring the Residential Agreement and Memorandum of Understanding null and void (3) awarding compensatory damages, costs, disbursements and attorneys fees.

NOW, plaintiffs and defendant Association having moved and cross-moved for summary judgment, and plaintiff having moved for class certification, and this Court, by the Honorable John E. Sprizzo, United States District Judge, having issued an Order, entered February 17, 1988, reserving decision on the motion for class certification, and ordering that (1) the Council on Industrial relations arbitration award dated May 18, 1987 be vacated, (2) the issue previously submitted for arbitration be submitted again to the Council on Industrial Relations for deci-

sion, (3) the motion and cross-motion for summary judgment be in all other respects denied, and (4) the case proceed to trial; and a trial having been held before the Court on the issues of liability and equitable relief on May 23, 24, 25, 26, July 25 and July 28, 1988, and counsel for the parties having thereafter submitted post-trial briefs and reply briefs, and the Court having thereafter submitted post-trial briefs, and the Court having rendered an oral decision following oral argument of counsel on FEbruary 2, 1989 and a written Opinion and Order on May 30, 1989 concluding that the New Inside Wiremen's agreement is and shall remain in effect for the remainder of its term, and the Residential Agreement and the Memorandum of Understanding are void and of no effect; and the Court having heard further argument at a conference on June 30, 1989,

and having orally denied plaintiffs' motion for class certification and dismissed defendant association's claims for damages and costs, it is therefore

ORDERED, ADJUDGED AND DECREED as follows:

1. The arbitration award of the Council on Industrial Relations dated May 28, 1987, in case number 5345, is vacated.

2. The Residential Agreement and Memorandum of Understanding are each declared null and void from the inception thereof.

3. The collective bargaining agreement known as the New Inside Wiremen's Agreement, entered into between defendant Union and defendant association is declared valid and binding from its inception date throughout its term.

4. Plaintiffs' motion for class certification is denied.

5. The Complaint is dismissed.

6. The defendant Association's cross-claims against defendant Union are dismissed.

7. The aforesaid dismissals are without prejudice to any party's right to seek an award of attorneys fees.

8. The defendant Union's cross-claim against defendant Association for damages for violations of the New Inside Wiremen's agreement is voluntarily dismissed without prejudice except that the defendant Association shall be barred from raising any defense which could have been raised at the trial of this proceeding.

9. Any application by plaintiffs or by defendant Union for costs, disbursements and/or attorneys' fees shall be made and considered following final determination on appeal from this Judgment or, if no appeal is taken by any party within the

time for appeal, after expiration of such time for appeal.

Dated: New York, New York

September 26, 1989

s/ JOHN E. SPRIZZO
John E. Sprizzo
United States District Judge

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of August one thousand nine hundred and ninety.

Present:

HON. JAMES L. OAKES, Chief Judge,

HON. RALPH K. WINTER, Circuit Judges.

HON. MICHAEL B. MUKASEY, District Judge.

Circuit Judges,

Ted Kozera, Mike Hanley, Chris Kulers, Michael Cinelli, Frank Honan, and James Stemmerman, each individually and as a member of Local Union 501 of International Brotherhood of Electrical Workers, and each on behalf of all persons members of Local Union 501 of International Brotherhood of Electrical Electrical Workers, similarly situated,

Plaintiffs-Appellees, Cross-Appellants,

v.

Docket Nos. 89-9072(L) 89-9160

Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc., Local Union No. 501 of International Brotherhood of Electrical Workers, AFL-CIO, and Donald Werle as President and Douglas Reid as Treasurer of Local Union 501, IBEW,

Defendants,

Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc.,

Defendant-Appellant,

Local Union No. 501 of International Brotherhood of Electrical Workers, AFL-CIO,

Defendant-Appellee, Cross-Appellee.

A petition for rehearing having been filed herein by Defendant Appellee, Cross-Appellee, LOCAL UNION NO. 501 Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

(2)

No. 90-770

FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

VS.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 90-770

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

v.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of Position

Respondent Local Union No. 501 of International Brotherhood of Electrical Workers, AFL-CIO (Local 501

or Union) supports the petition for certiorari.

Certiorari should be granted to review that part of the judgment and opinion of the Court of Appeals which set aside findings of fact not clearly erroneous. The action of the Court of Appeals for the Second Circuit is a result of a combination of its own view of Rule 52(a), F.R.C.P., which view is at odds with the position of other courts of appeal, and a blatant failure to follow its own decisions even within its particular position on the applicability of the rule. The split in the circuits should be resolved and directions for the proper application of Rule 52(a) to the facts of this case should be given.

Certiorari should be granted to

review that part of the judgment and opinion which reversed the District Court and held that, conditional on two facts to be determined on remand, Local 501, as an entity, is liable for a breach of its duty of fair representation based solely on the unauthorized and unratified conduct of two of its officers, which conduct is contrary to both the stated policy of the Union and to the expressed preference of Local 501's Executive Board. The action sought to be reviewed is contrary to the decisions of this Court and the subject is important in the development of federal labor law.

Additional Statement of Facts

This statement is a supplement to the statement set forth in the petition for certiorari and presumes

familiarity with the facts set forth therein.

The District Court found, and the Court of Appeals did not disburb the finding, that Local 501's Executive Board "never approved the small work agreement and ... expressed a preference for taking legal action to vacate the arbitration award which had directed the Union to sign the small work agreement." (39a)[1/]

Thus, Local 501's letter stated that petitioners' July 1986 petition asking Local 501 to commence legal action to vacate the residential agreement was rejected only because the petition had been submitted to a selected small minority of the membership who may

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1/ References are to the appendix to the petition for a writ of certiorari.

not have been adequately informed. Local 501, within a few days of receipt of the petition, sent ballots and a copy of the complete residential agreement to the entire membership to ascertain whether it wanted the Union to start legal action to vacate that agreement. The plaintiffs filed their complaint in this case on the business day immediately preceding the date set for the counting of those ballots.

I

Reasons For Granting So Much Of The Writ As Seeks Review Of The Court Of Appeals Reversal Of The District Court's Finding Of Fact In Apparent Violation Of Rule 52(a), Federal Rules Of Civil Procedure

A. Judgments and Opinions Below

The judgments and opinions below rest essentially on one findin[illegible] of

fact: whether the Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc. (the Chapter) could have reasonably relied on the actions of two officers of Local 501, Werle and Horrigan to bind the Union.

The District Court received over seventy exhibits and heard testimony from ten witnesses, witnesses having been called by all three parties. The District Court assessed the witnesses' credibility and made detailed findings of fact supported by specific references to the documentary and testimonial evidence.

The District Court found "that the Chapter was aware that ratification by the membership was required, and that it could not have reasonably relied on the actions of Werle and Horrigan ....[8]

See Tr. at 51-52, 328-329; Ex. 25."
(footnote 8 omitted now) (41a-42a)

The District Court concluded: "Nor was the Chapter entitled to rely on apparent authority." (40a)

The Court of Appeals did not question the record evidence on which the District Court relied. But it made a contrary finding, writing: "Even though the Residential Agreement had not been ratified by the membership, we conclude that, notwithstanding the issue of the duty of fair representation and disclosure owed by the Local Union's president and manager to the membership, the Chapter could reasonably believe that officers of the Local Union had authority pursuant to the arbitration award to bind the union membership." (15a)

The court of appeals did not support the above finding of fact with a single reference to any evidence. Rather it cited three decisions of other courts in other cases based on other facts, each other decision being fact specific. The opinion reads: "See NLRB v. Local 815, Int'l. Bhd. of Teamsters, 290 F.2d 99, 103 (2d Cir. 1961) (Friendly, J.) (a union may be responsible for the actions of its agents if third parties dealing with the agents reasonably believe the acts to be authorized); see also Metco Prods., Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989) (same); Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1112-14 (6th Cir. 1986) (same), cert. denied, 479 U.S. 1086 (1987)." (15a)

The Court of Appeals did not cite a single iota of evidence to support the requirement that even it recognized, that the Chapter "reasonably relieve the acts to be authorized".

The District Court had written: "The fact that the actions were taken in part at the direction of the arbitrator does not change this result. The Chapter was certainly aware and should have been aware that the arbitrator's direction Arguably exceeded his powers as this Court has since found." (ftnt. 8, 41a)

The Court of Appeals countered: "Because the Chapter had no reason to doubt the authority of union officers to

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2/ The finding and holding that the arbitrators had exceeded their powers was affirmed by the Court of Appeals. (12a)

comply with an arbitration order, we think that both the Inside Wiremen's Agreement and Residential Agreement are binding upon the Local Union." (16a)

The Court of Appeals, however, did not support the above finding of fact with any reference to any evidence in the record. The Court of Appeals did not rebut any of the District Court's findings of "historical fact and the inferences therefrom" (see Karavos Compania Naviera v. Atlantica Export Corporation, 588 F.2d 1, 8 (2d Cir. 1978) (Karavos), nor did it even attempt to show that the District Court's finding was "clearly erroneous". (Rule 52(a), F.R.C.P.)

B. The Split in the Circuits.

Most of the circuits subscribe to the proposition that: "A finding that

one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard .... The nature and extent of the agent's authority and whether apparent authority existed are also questions of fact." Dogherra v. Safeway Stores, Inc., 679 F. 2d 1293, 1295 (9th Cir. 1982), cert. denied 459 U.S. 990 (1982) (Dogherra).

The above quotation is cited with approval in Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F. 2d 1098 at p. 1113 (6th Cir., 1986), cert. denied 479 U.S. 1086 (1987) (Kraftco). In Kraftco the court, dealing with the question of apparent authority, stated the commonly accepted proposition that the party

seeking to establish apparent authority had the burden of proof, lists some of the facts which must be proved "At the minimum" and, quoting from Kitchen Fresh, Inc. v. NLRB, 716 F.2d 351, 356 (6th Cir. 1983), wrote: "The question whether an employee is an agent is a question of fact ...." In addition to Dogherra, supra, the Court is respectfully referred to Consolidation Coal Co. v. UMW, 725 F.2d 1258, 1262-63 (10th Cir. 1984); North River Energy Corp. v. UMW, 664 F.2d 1184, 1190-1192 (11th Cir. 1981); and Mullett v. NLRB, 571 F. 2d 1292, 1294 (4th Cir. 1978) from other circuits.

In addition, the First Circuit has held that the question of apparent authority is one of fact to be determined by the trier of fact, Moreau v. James

River-Otis, Inc., 767 F.2d 6, 10-11 (1st Cir. 1985) as has the Third Circuit, Drexel v. Union Prescription Centers, Inc., 582 F.2d 781, 796 (3d Cir 1978); Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir. 1971)

The Second Circuit, on the other hand, wrote in Karavos, supra, at page 7: "Appellee's contention that 'the existence of an agency relationship is a question of fact' the decision of which by a district judge must stand unless clearly erroneous, F.R. Civ. P. 52(a), flies in the face of this court's long held position, reiterated as recently as in Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1200 n.3, ..., that '[t]he application of a legal standard to the fact is not a "finding of

fact" within the rule,' citing In re Hygrade Envelope Corp., 366 F.2d 584, 588 n.4 (2 Cir. 1966)."

To the above proposition, the Second Circuit itself has an important exception, recognizing that the clearly erroneous standard does apply to a district court's "findings which are of historical fact and the inferences therefrom ..." Karavos, supra, at page 8.

Moreover, the law in the Second Circuit on this point is itself unclear. In Lee v. Jenkins Brothers, 268 F.2d 357 (2d Cir. 1959), cert. denied 361 U.S. 913 (1959), the court wrote: "As the case may be reviewed by the Supreme Court, we shall treat each of the important and controlling questions of law raised at

the trial." 268 F. 2d at p. 360. With that as prologue, the Second Circuit further wrote: "Apparent authority is essentially a question of fact .... In certain instances a given contract may be so important to the welfare of the corporation that outsiders would naturally suppose that only the board of directors (or even the shareholders) could properly handle it .... Beyond such 'extraordinary' acts, whether or not apparent authority exists is simply a matter of fact." (footnote omitted) 268 F. 2d at p. 370

Lee v Jenkins Brothers has never been questioned or reversed by the Second Circuit, and the "Apparent authority is essentially a question of fact" language was quoted with approval

in that circuit as recently as 1985. See Utica Mutual Insurance Company v. Fireman's Fund Insurance Companies, 613 F. Supp. 1134 (S.D.N.Y. 1985).

The split in the circuits concerning the application of Rule 52(a) to findings of fact on the question of apparent authority should be resolved particularly as the question arises frequently in the area of labor law where the Congress has entrusted the development of the substantive law to the federal courts.

C. Failure of the Second Circuit To Follow Both Its Own Precedent And The Federal Labor Law

This Court has held that Congress "provided that the common law of agency shall govern in determining whether any person is acting as an

'agent' of another person." Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 217 (1979) (Carbon Fuel).

The common law is that "Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." Restatement, Second, Agency, section 8, comment (c).

The Restatement, Second, Agency, section 9 reads in material part:

"Notice

"(1) A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it.

"(2) A person is given notification of a fact by another if the

latter

"(a) informed him of the fact by adequate or specified means or of other facts from which he has reason to know or should know the facts;"

One of the evidentiary sources cited by the District Court in its opinion to support its finding that the Chapter could not have reasonably relied on the actions of Werle and Horrigan, was exhibit 25. (41a-42a) Exhibit 25 is a Local 501 written brief which was served on the Chapter in a prior unrelated arbitration which explicitly stated, inter alia, that no one in the positions held by Werle and Horrigan had the authority to bind the Union to a collective bargaining agreement, or to an amendment to a collective bargaining

agreement, without the ratification of the Local 501 membership. The above finding was an "historical fact" to which even the Second Circuit admits it is bound.

The courts appear to be unanimous in holding that "an employer has no right to rely on the appearance of authority of the bargaining agent if it has knowledge to the contrary. This is an elementary principle of the law of agency." Goclowski v. Penn Central Transportation Co., 571 F. 2d 747, 759 (3 Cir. 1978) (Goclowski) And: " ... under the principles of agency, one party to a contract may not rely on an agent's authority to enter into it on behalf of his principal, when the party has knowledge of limitations placed on that grant by the agent's principal."

Goclowski, supra, at p. 756

In the instant case the District Court found as an historical fact that the Chapter had notice that Werle and Horrigan did not have authority, absent membership ratification, to bind Local 501 to a collective bargaining agreement or to an amendment thereto. The Court of Appeals did not question that finding.

Moreover, the courts also hold that the evidentiary basis for a third person to conclude that an agent has apparent authority must come from the principal. E.g. Moreau, supra, 767 F.2d at p. 9 "must be established by proof of something said or done by the principal ..."; see Kraftco, supra, 799 F. 2d at p. 1113 quoting with approval from

Moreau, "Apparent authority can, therefore, be created only by the principal's manifestation to a third party ..."

The foregoing has also been stated, but not followed in this case, by the Second Circuit quoting, with approval, Professor Mechem: "The authority of an agent, and its nature and extent ..., can only be established by tracing it to its source in some word or act of the alleged principal." Karavos, supra, 588 F.2d at p. 10

The Court of Appeals in the instant case did not support its finding of apparent authority on any act or word by the principal.

D. Conclusion

This Court wrote, in Carbon

Fuel, supra, at p. 217:

> "Congress' reason for adopting the common-law agency test, and applying to unions the common law doctrine of respondent superior, follows the lead of Mr. Chief Justice Taft in Coronado Coal Co. v. Mine Workers, 268 U.S. 295, 304 (1925), that to find the union liable 'it must be clearly shown ... that what was done was done by their agents in accordance with their fundamental agreement of association.'"

In this instant case the evidence before the District Court and Court of Appeals, which included both Exhibit 25 which, in turn, referred to the International Union's constitution as the basis for Werle's and Horrigan's lack of authority and the International Union's constitution itself, showed that what was done by Werle and Horrigan was contrary to the "fundamental agreement of association."

A writ of certiorari should be granted to resolve the split in the circuits and to decide this important question of federal labor law. The District Court's "account of the evidence is plausible in light of the record in its entirety", Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985)

II

Reasons For Granting So Much Of The Writ As Seeks Review Of The Reversal Of The District Court By Holding That, Conditional On The Determination Of Two Facts On Remand, Local 501, As An Entity, Is Liable For Breach Of Its Duty Of Fair Representation Based Solely On Unauthorized And Unratified Conduct Of Two Of Its Officers, Which Conduct Is Contrary To The Stated Policy Of The Union And To The Expressed Preference Of Local 501's Executive Board.

Petitioners and Local 501 read the decision of the Court of Appeals

differently. The petitioners read it to hold that "a breach of duty of fair representation committed by a labor union's officers is not attributable to the union if 'unauthorized,'" (petition, page 24). Local 501 reads it exactly to the contrary. The Court of Appeals wrote: "Yet we conclude that if the acts of the president and the business manager are found to violate the union's duty of fair representation, such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts." (17a) The Court of Appeals further wrote: " ... we vacate the district court's finding that the Local Union may not be held liable for any potential

breach of the duty of fair representation ..." (17a)

Local 501 considers that the petitioners have won the very point on which they seek review. The Court of Appeals, depending on further facts, would hold Local 501 liable based on the unauthorized and unratified acts of two of its officers. The case was remanded for "further factual amplification" for "a determination of whether the agents' actions constituted a breach, and whether such breach might have been avoided through institution of proper safeguards." (17a)

Reading the Court of Appeal's decision as we do, we ask this Court to grant certiorari to review the determination of the Court of Appeals on the Local's potential liability because,

if not reviewed now, the reversal of the District Court will become the law of the case and because that Court of Appeals' determination on the facts of this case fails to follow the decisions of this Court. See National Association for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 930-931 (1982); Complete Auto Transit v. Reis, 451 U.S. 401, 415-416 (1980); Carbon Fuel Co. v. United Mine Workers of America, 444 U.S. 212, 216 (1979).

The holding that the conduct of Local 501's two officers "cannot be properly imputed to the Union" (45a) was made by the District Court on the basis of findings of fact rooted in the record and supported by references in the opinion to the particular facts of this case. (45a-46a) The Court of Appeals

reversed without disputing the District Court's findings of fact, without basing its reversal on any reference to any particular facts which it found, but writing only that "such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts." (17a) citing American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (Hydrolevel).

Local 501 does not object to or oppose the application of the "meaningful standards" test enunciated in Hydrolevel, supra, but the Court of Appeals by seeking to apply only that test has jettisoned the bulk of the law of agency relevant to this case. For, by paying no attention to the facts of this case, it

has overlooked all the applicable criteria and inquiries which ordinarily precede the application of the "meaningful standards" test. Were the law to be followed as stated by this Court, even if the facts to be determined on remand were found adversely to Local 501, the determination of the District Court should stand.

This Court has closely examined the legislative history of the Taft-Hartley Act with particular reference to union liability and the subject of agency. In treating that legislation the Court has written:

> "At the same time, Congress gave careful attention to strikes during the term of a collective-bargaining agreement, but stopped short of imposing liability upon a union for

strikes not authorized,

participated in, or ratified by it."

Carbon Fuel Co. v. UMW, 444 U.S. at p. 216

"The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the no-strike provision of a collective-bargaining agreement only against unions, not individuals, and, as to unions, only when they participated in or authorized the strike." (emphasis in original)

Complete Auto Transit v. Reis, 451 U.S. at p. 415-416.

NAACP v. Claiborne Hardware, supra, is a post-ASME case and actually cites ASME v. Hydrolevel at 458 U.S.

p. 930. Yet, in NAACP v. Claiborne Hardware the Court did not apply the "meaningful standards" test because it never had to reach it. The Court reviewed the facts and found that the statements attributed to an admitted agent of the NAACP were "contrary to NAACP policy" 458 U.S. at p. 930, that there was no evidence that the NAACP had ratified the violence complained of (458 U.S. at p. 930-931) or had specific knowledge of any acts of violence or threats (458 U.S. at p. 931), or had authorized the boycott which had led to threats and violence. (458 U.S. at p. 931)

It was on the basis of the above criteria, knowledge, authorization and ratification, that the District Court in the instant case found that the

conduct of two officers could not be imputed to Local 501. The application of the "meaningful standards" test will not alter the above and the law should not be changed to substitute the "meaningful standards" test for the common law criteria for determining responsibility because of an agency relationship.

Lastly, we note that there is no basis for applying other than the common law of agency standards in duty of fair representation cases. In Breininger v. Sheet Metal Workers, ___U.S.___, 110 S. Ct. 424 (1989), the case cited by petitioners, the responsibility of the union for the acts of its agent was not based on the acts of the agent alone, it was based in part on the refusal of the union itself to

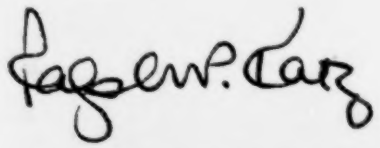
respond to the member's grievances. Thus, in Breininger, we read: "Petitioner alleges that respondent refused to honor his specific employer requests for his services and passed him over in making job referrals. He also contends that respondent refused his internal union grievances regarding these matters." 110 S. Ct. at p. 428 (emphasis added)

The "meaningful standards" test is a new legal development. This Court's exposition of its place in the fabric of the law is needed.

CONCLUSION

For all the reasons above stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,



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Supreme Court, U.S.
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No. 90-770

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TFD KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

vs.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented For Review

Whether the Court of Appeals for the Second Circuit properly reversed in part the judgment of the District Court for the Southern District of New York when that District Court's judgment ignored the findings of an arbitration award under a labor contract and when the Court of Appeals reversal was based upon the legal principles of the proper application of an arbitration award by the federal district courts?

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No. 90-770

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Petitioners,

v.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

Counter-statement Of The Case

The petition of the plaintiff-petitioners, six members of the respondent Local 501 seeks review of the reversal by the Second Circuit Court of Appeals, reported at 909 F.2d 48 (2d Cir. 1990), of the District Court's judgment

reported at 714 F.Supp 644 (SD NY 1989).

The Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc. ("Chapter") is an employer association that represents various electrical contractors in the electrical construction industry for collective bargaining purposes. Local Union No. 501 of International Brotherhood of Electrical Workers, AFL-CIO ("Local 501") is an unincorporated association constituting a labor organization representing employees in an industry affecting commerce. Ted Kozera and the other named plaintiffs are electrical workers and members of Local 501.

Local 501's dispute with the Chapter arose from a 1983-1986 collective bargaining agreement

containing provisions for the renewal or renegotiation of the agreement and arbitration clauses for unresolved issues. Any arbitration was agreed to be brought before the Council on Industrial Relations for the Electrical Contracting Industry ("CIR"). The Court of Appeals characterized the nature of this dispute as being the role of labor arbitrators and courts in construing the validity of collective bargaining agreements that leave contested issues open for future negotiation by the parties.

Negotiations for a new collective bargaining agreement were conducted from May 1986 through June 1986 by a Joint Labor Management Committee composed of representatives of the Chapter and Local 501. The Chapter consistently emphasized to Local 501 during these

negotiations that it was essential for any new collective bargaining agreement to contain a Small Work Addendum. This Addendum was to provide a modified wage rate for residential and light commercial work to allow the union electrical contractors to compete more effectively with non-union electrical contractors and to recapture lost markets.

The Chapter and Local 501 agreed in a handwritten memorandum on June 13, 1986 to the terms of a collective bargaining agreement for a three year period which included a reference to the Small Work Addendum. The issue was negotiated at a meeting on April 27, 1987 and a proposed Residential Agreement and a Memorandum of Understanding were submitted by representatives of the International Brotherhood of

Electrical Workers ("IBEW) and the National Electrical Contractors Association, Inc. ("NECA").

Local 501 then submitted a draft of a proposed collective bargaining agreement to the Chapter which did not include any reference to residential or light commercial work. The Chapter refused to sign the draft agreement on the grounds that it did not reflect the June 13, 1986 Memorandum and did not incorporate the Small Work Addendum. Thereafter, Local 501 submitted the issue of the Small Work Agreement and the Chapter's refusal to sign it to the CIR for arbitration. The CIR decision dated May 18, 1987 ordered both parties to sign the Inside Wiremen's Agreement and the Residential Agreement.

Authorized representatives of

both Local 501 and the Chapter then signed the Inside Wiremen's Agreement, Residential Agreement, and the Memorandum of Understanding on June 11, and June 18, 1987. Business Manager Horrigan stated that he had the constitutional authority to sign the agreements and the consent of the membership due to their prior ratification. The Chapter treated the Residential Agreement as valid and began implementing its terms.

Six members of Local 501 in July of 1987 initiated this action alleging breach of duty of fair representation by the Local Union entering into the Residential Agreement and brought action against the Chapter for violating the Inside Wiremen's Agreement by putting into effect the Residential Agreement and Memorandum of Understanding. The District Court vacated the first CIR

award dated May 18, 1987 on the following grounds: that the arbitrator had exceeded his authority by instructing the parties to sign the Residential Agreement; that the only proper issue was whether the Chapter was justified in refusing to sign the Inside Wiremen's Agreement absent an agreement on residential work. This CIR decision was subsequently vacated and these issues were remanded to the CIR by order of Hon. John E. Sprizzo dated February 17, 1988. The CIR pursuant to the remand and by decision dated April 8, 1988, held:

> "Absent a resolution by the parties for Residential and Small Work, the Westchester-Fairfield Chapter, NECA is not required to sign the Inside Wiremen's Agreement in question."

The arbitrator held the three documents to be unitary; to be valid or invalid as a package. Contrary to the findings of fact of the second CIR

decision of April 8, 1988 the District Court, by order dated May 30, 1988, held that the Residential Agreement was not valid and that the Inside Wiremen's Agreement was binding and that the Chapter had violated the Inside Wiremen's Agreement by implementing the unauthorized provisions of the Residential Agreement.

The case was then appealed to the Court of Appeals for the Second Circuit. The Court of Appeals held:
(1) that the District Court had properly vacated the first CIR arbitration award based on the grounds that the arbitrator had overstepped the authority delegated;
(2) the Chapter was justified in refusing to sign the Inside Wiremen's Agreement because said agreement was contingent upon an agreement by the parties on the Residential Agreement;
(3) that the Residential Agreement and

Inside Wiremen's Agreement were binding on the parties.

ARGUMENT

There Is No Substantial Need To Grant The Petition

The Court of Appeals reversal of the District Court's ruling was based upon legal principles concerning judicial review of an arbitrator's decision. The Court of Appeals recognized the well-established principle, particularly in the context of labor relations, that:

> "Although a district court may vacate the findings of an arbitrator if it concludes that the arbitrator decided an issue beyond the scope of his or her delegated authority, see United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597-99 (1960); Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 281-82 (1st Cir. 1983), the presumed authority of an arbitrator to resolve issues is broad, and courts expansively interpret the scope of an arbitrator's delegated authority by resolving doubts in favor of arbitrability." See AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986); Transit Mix Concrete Corp. v. Local Union No. 282, 809 F.2d 963, 968 (2d Cir. 1987).

Applying the principles set forth above, the Court of Appeals declared that the District Court's vacation of the Residential Agreement, combined with its enforcement of the Inside Wiremen's Agreement, demonstrated an erroneous disregard of the Council of Industrial Relations' ("CIR") second decision dated April 8, 1988. The Court of Appeals finding was based upon the legal principle that the District Court cannot set aside an arbitrator's award which was decided within delegated authority.

The Petitioners inaccurately claim that the Court of Appeals' decision was based upon new findings of fact or an erroneous interpretation of the District Court's findings of fact. However the decision of the Court of Appeals makes it clear that it did not

reject the District Court's findings of fact but that it reversed on the grounds that the District Court too summarily dismissed the second CIR arbitration award that the District Court had ordered.

The Court of Appeals declared that the District Court properly vacated the first CIR award on the basis that the arbitrator "went beyond his delegated authority" by ordering the parties to sign the Residential Agreement because the parties delegated to the CIR only the power to decide the validity of the Inside Wiremen's Agreement. Having found so, the District Court remanded the following issue to the CIR: "Whether the Chapter was justified in refusing to sign the Inside Wiremen's Agreement absent an agreement on residential work."

Accordingly, the CIR issued a revised decision dated April 8, 1988 holding that absent an agreement on residential and small work, the Chapter was not required to sign the Inside Wiremen's Agreement. Nevertheless, this second CIR award was erroneously disregarded by the district court. The Court of Appeals recognized this error and stated: "They must rise or fall together."

The Court of Appeals correctly held that the District Court's disagreement with an arbitrator's factual findings is an insufficient basis for vacating the arbitrator's award. It is on that ground that the Court of Appeals found unsupported the District Court's holding that the Inside Wiremen's Agreement could be enforced even

absent the Residential and Small Work Agreement.

The Court of Appeals, having found that the Inside Wiremen's Agreement and the Residential Agreement "must rise or fall together", decided the question of whether both agreements should be enforced or declared invalid. The court held that a federal court has jurisdiction to determine the validity of a collective bargaining agreement pursuant to 29 USC Section 185(a) and ancillary to that determination has the power to declare a purported agreement either invalid or binding. The Court of Appeals for the Second Circuit joined the Third, Fifth, Seventh, Ninth, Tenth and Eleventh Circuits in allowing a district court to determine the validity of a collective bargaining agreement as

part of the power to determine whether there has been a breach. See IBEW, Local 481 v. Sign-Craft, Inc., 864 F.2d 499, 501-02 (7th Cir. 1988); Mack Trucks, Inc. v. International Union, UAAAIW, 856 F.2d 579, 586-90 (3d Cir. 1988), cert. denied, 108 S.Ct. 1316 (1989); Rozay's Transfer v. Local Freight Drivers, Local 208, 850 F.2d 1321, 1326 (9th Cir. 1988), cert. denied, 109 S.Ct. 1768 (1989); McNally Pittsburg, Inc. v. International Ass'n of Bridge, Structural & Ornammental Iron Workers, 812 F.2d 615, 617-19 (10th Cir. 1987); Board of Trustees v. Universal Enters., 751 F.2d 1177, 1184 (11th Cir. 1985); United Steelworkers of America v. Rome Indus., Inc., 437 F.2d 881, 882-83 (5th Cir. 1970).

The Court of Appeals declined to uphold both Agreements on the

grounds of the first CIR award because it had exceeded the CIR's authority. The Court of Appeals found however that both Agreements could be enforced on the grounds that they were signed by Local 501 and the Chapter.

The Court of Appeals held as a matter of law that the Chapter could reasonably believe that officers of the Local 501 had authority pursuant to the arbitration award to bind the union membership. See NLRB v. Local 815, Int'l Bhd. of Teamsters, 290 F.2d 99, 103 (2d Cir. 1961) (Friendly, J.) (a union may be responsible for the actions of its agents if third parties dealing with the agents reasonably believe the acts to be authorized); see also Metco Prods., Inc. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989); Central States Southeast and Southwest Areas

Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1112-14 (6th Cir. 1986), cert. denied, 479 U.S. 1086 (1987). The Court of Appeals held that because the Chapter had no reason to doubt the authority of union officers to comply with an arbitration order, both the Inside Wiremen's Agreement and the Residential Agreement are binding upon Local 501.

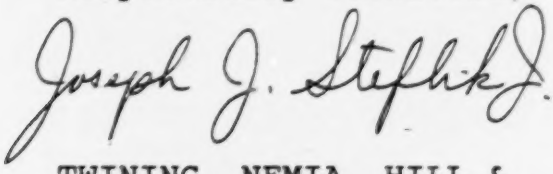
The Court of Appeals did not violate Rule 52(a) of the Federal Rules of Civil Procedure since it reversed based upon the District Court's erroneous application of legal principles regarding application of an arbitration award.

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be denied.

Date: December 11, 1990

Respectfully submitted,



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